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No. 88-309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF FOR THE PETITIONER

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March 9, 1989

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QUESTION PRESENTED

Under the implied-reservation-of-water doctrine, a Federal reserved water right of 500,000 acre feet was quantified based on over 100,000 acres of "practicably irrigable acreage" within the present boundaries of the Wind River Indian Reservation in Wyoming. Pursuant to a 1905 congressional directive, however, water rights for the irrigation of 145,000 acres of Indian lands had previously been obtained under state law, overlapping more than 70% of the lands for which the Federal right was subsequently quantified.

The question presented is:

1. In the absence of any demonstrated necessity for additional water to fulfill Reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within the Reservation?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, State of Wyoming, and the respondents, United States of America, Shoshone Tribe of the Wind River Indian Reservation, Northern Arapaho Tribe of the Wind River Indian Reservation, Mary O. Ahlborn, Eva M. Barnett, Owen Barnett, Bradford Bath, Donald Bath, Black Butte Livestock Company, Campbells, Inc., City of Riverton, Wyoming, Kenneth Ward Crandall, Phyllis L. Crandall, DHB & Co., Barbara J. Daniels, Billie M. Daniels, Deaver Irrigation District, Carl Dockery, Carol Dockery, Clyde R. Fisher, Gloria A. Fisher, Charles Goldben, Grace Graboski, Griffin Brothers, Incorporated, Olga J. Harvey, Robert W. Harvey, Albert Hornecker, Hornecker Livestock Co., Inc., Bertha Jones, Brenda Joyce Kellogg, Gary V. Kellogg, Irene M. Long, Russell E. Long, Elsie Martin, Richard Martin, William A. Matthews, Arthur D. McCumber, Marvin W. Meyer, Ernestine S. Meyer, Midvale Irrigation District, Carolyn R. Nelson, Vern Nelson, Norwest Bank of Omaha, N.A., Norris Edwin Odee, F. Louise Odee, William Okie, Kenneth Outland, Iona Outland, Owl Creek Irrigation District members, PLB & Co., Sylvia Paulsen, Red Creek Cattle Company, Red Lane Watershed Improvement District, Jerry D. Redding, Sheila C. Redding, Charles Richardson, Riverton Valley Irrigation District, C. Duane Rush, Kathryn C. Rush, Brian F. Sanford, Kathleen Sanford, Norman L. Sanford, Daisy E. Sessions, Newell S. Sessions, Barbara Smith, Robert Stewart, Town of East Thermopolis, Wyoming, Ralph Floyd Urbigkit, V E Bar Livestock Company, Barbara Webber, Landis Webber, Delores J. Weese, Raymond C. Weese, Willwood Irrigation District, Ruth Clare Yonkee.

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IN THE

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UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

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On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Wyoming Supreme Court (Pet. App. A, p. 1a, et seq.) is reported at 753 P.2d 76 (Wyo. 1988). The unreported trial court opinions include: the amended judgment and decree of the state district court, May 24, 1985 (Pet. App. D, p. 168a, et seq.); the district court's Order of May 24, 1985, ruling on its master's supplemental and final report (Pet. App. C, p. 121a, et seq.); the district court's judgment of May 10, 1983, ruling on its master's initial report (Pet. App. F, p. 202a, et seq.); and the district court's order of June 8, 1984, ruling on various post-judgment motions (Pet. App. E, p. 185a, et seq.). The reports of the state court's master include: the supplemental and final report of the district court's master of June 1, 1984 (Pet. App. G, p. 280a, et seq.) and the master's initial report of December 15, 1982 (Pet. App. H, p. 367a, et seq.).

The Federal district court's order, remanding the matter back to state court and its findings of fact and conclusions of law therein (Pet. App. I, p. 718a, et seq.) dated May 31, 1977, have not been reported.

JURISDICTION

The decision of the Wyoming Supreme Court was rendered on February 24, 1988, affirming in part and reversing in part the amended judgment and decree of the state district court, and remanding the matter for further proceedings consistent with the opinion. The Wyoming Supreme Court denied timely petitions for rehearing on April 22, 1988. This Court's Order Extending Time to File Petition for Writ of Certiorari to August 20, 1988, was entered in A-14 on July 7, 1988. On August 19, 1988, the petition for a writ of certiorari was filed and was granted, with respect only to question 2, on January 23, 1989. On February 23, 1989, the Court granted Petitioner's Motion. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATEMENT

This general adjudication of all water rights in Wyoming's Big Horn River Basin, comprising over thirteen million acres and including the Wind River, began in January, 1977, with the filing of the petitioner's complaint and service of process on over twenty thousand water users. The United States, claiming water rights in its proprietary capacity and as trustee for the Shoshone and Arapaho Tribes of the Wind River Indian Reservation (hereinafter sometimes referred to as the "Reservation"), removed the adjudication to the United States District Court which remanded the adjudication to state court. The state district court denied motions to dismiss by the Tribes and the United States, allowed the Tribes to intervene, and appointed a special master. The master divided the adjudication into three phases: (1) federal water right claims by and on behalf of the Tribes of the Reservation, which are now before this

Court, (2) federal water right claims of the United States in its proprietary capacity (e.g., Yellowstone National Park and two national forests) which were resolved by negotiation, and (3) approximately 27,000 claims by all parties based primarily on state law, which are still before the state district court's master.

Development of the Big Horn Basin

Prior to the arrival of non-Indian settlers in the early 1800's, Wyoming was inhabited exclusively by competing Indian tribes. Beginning in the 1840's, the Shoshone Tribe made occasional forays from their ancestral territory across the mountains into the Wind River Valley to hunt and to fight competing tribes. At the time the Reservation was created, however, no ethnological group within the Shoshone Nation classifiable as "Wind River Shoshones" existed. Indeed, the First Treaty of Fort Bridger, 1851, assigned the Wind River Valley to the Crow Indians. It was not until 1868 that the United States granted Washakie's desire to relocate his band to the Wind River.

Non-Indian development of lands within the Big Horn Basin was induced by various land disposal acts resulting from Congressional recognition that settlement and subsequent development of the vast western public lands would not proceed without favorable legislation. Within the Big Horn Basin, public lands were disposed of under the Cash Entry Act, the State Selection Act, the Homestead Act, the Stock Raising Homestead Act, the Mining Act, the Desert Land Act, the Carey Act and the Reclamation Act. Because water rights did not accompany a land patent established under any of the disposition acts, it was the responsibility of the settlers seeking patents under the disposition acts to initiate their own water rights under state law. In the case of several of these acts, however, no patent would be granted until water rights were obtained.

By the mid-1880's, non-Indian settlement of the basin was proceeding apace. Farms, ranches, and small com-

munities had been established. The earliest settlers obtained the most desirable lands and later settlers moved into the interior valleys of the basin, necessitating the construction of large irrigation projects to supply water to the newly-settled lands. As early as 1904, President Theodore Roosevelt authorized construction of the Shoshone Reclamation Project, an effort spanning over 50 years and ultimately resulting in the development of over 90,000 acres of irrigated lands in the basin. In 1905, the Governor of Wyoming initiated a survey of lands within the Wind River Basin which were formerly a part of the Reservation but which were ceded to the United States by the Act of March 3, 1905, 33 Stat. 1016 ("1905 Act"). Pet. App. X, p. 769a. The survey set out approximately 335,000 acres of land as potentially irrigable and secured all of the remaining water rights for the Wind River drainage, essentially determining the boundaries for what would later become the Riverton Irrigation Project. As a consequence of these efforts, and thousands like them, present non-Indian irrigation comprises approximately 550,000 acres, of which 120,000 acres are within the exterior boundaries of the Reservation.

The Wind River Indian Reservation

Originally part of the public domain created by the Louisiana Purchase, the Wind River Indian Reservation was established for the Shoshone by the Second Treaty of Fort Bridger of 1868, 15 Stat. 673. Pet. App. AA, p. 793a, et seq. Subsequently the Arapaho were settled on the Reservation, for which the Shoshone were later compensated. Through a period ending in 1905, the Reservation was three times reduced in size by agreement with the Tribes. , The last and most substantial reduction (1,480,000 acres) resulted from the Second McLaughlin Agreement of 1904, ratified by the 1905 Act. Under an active allotment program, some 2,500 allotments, comprising over 240,000 acres, passed into individual Indian ownership. For roughly 35 years the remaining or "diminished" Reservation's exterior boundaries remained stable. Outside of those boundaries, however, the ceded

lands were returned to public domain status, within that area 88,000 acres were entered and settled by non-Indians by 1918 and 336,000 acres were withdrawn for a major reclamation project, to be disposed of by homestead entry.

Reservation Water Development Pursuant to State Law

Under what was known as the "Water Proviso" of the 1905 Act's Article III (Pet. App. X, pp. 778-779a), a part of the proceeds from the sale of ceded lands was designated to obtain water rights for the Indians under Wyoming law. This amount, together with supplemental federal appropriations of $2,264,100, was used to fund the acquisition of state water permits and the development of canals, reservoirs and cultivated lands to perfect the permitted rights. By 1915, state water rights had been acquired on behalf of the Indians for the irrigation of approximately 145,000 acres of Reservation lands, including over 70% of the lands for which Federal reserved water rights were eventually awarded, and major federal irrigation projects had been constructed for the benefit of Indian lands. During the same period, 3,500-4,000 non-Indians entered the lands ceded by the 1904 agreement and applied for state permits to irrigate approximately 400,000 acres. Development of Indian irrigation projects on the Reservation was characterized by extensive cooperation between the Indian Service and the Wyoming State Engineer. From 1905 to 1963, as delays in completing project construction on portions of the diminished Reservation prevented timely application of water to beneficial use upon many Indian tracts, extensions were routinely granted by the State Engineer. Furthermore, during this period, water was applied to beneficial use on many Indian tracts and certificates of appropriation were issued by the State Board of Control confirming water rights, generally with a 1905 priority date.

As would be expected, however, announcement of *Winters v. United States*, 207 U.S. 564 (1908) (hereinafter "*Winters*"), and the opinions which it affirmed, caused

some Indian advocates to seek application of the *Winters'* implied-reservation-of-water doctrine to the Wind River Indian Reservation. Consistent with its 1905 decision to require the Tribes to define and perfect their water rights pursuant to Wyoming law, Congress rebuffed attempts in 1914 to provide for an express reserved water right for the Reservation. The steady progress of the Indian Service in its work to build irrigation systems within the Reservation doubtless lent support to arguments of Congressmen that the system put in place by the 1905 Act was working satisfactorily. Beginning in 1963, however, unperfected state-awarded water right permits for 58,000 acres were allowed by the United States to expire, leaving perfected state-awarded water rights in place for 87,000 acres.

Restoration and Reacquisition of Ceded Lands

Beginning in 1940 and ending in 1974, large tracts of vacant ceded lands, needed by the Tribes for grazing purposes, were permanently "restored to" and "made a part of" the Reservation by the United States. Pet. App. L, N-V, pp. 729a, 731a-752a. Approximately 42,000 acres of lands originally allotted to individual Indians have been conveyed to non-Indian grantees within the Reservation. In addition, several thousand other non-Indians live either on ceded lands patented under the public land laws after 1905, on lands in the large Riverton Reclamation Withdrawal located on ceded lands, within the current boundaries of the Reservation, or on land leased from Indians.

Claims By and on Behalf of the Tribes

In this adjudication, the United States claimed federal water rights on behalf of the Reservation's Tribes under the implied-reservation-of-water doctrine, including some 570,000 acre feet for historic and future irrigation. The Tribes subsequently concluded that the United States' reserved water right claims were inadequate and filed their own supplemental claims for an additional 1,103,000 acre feet for irrigation. In addition, non-Indian grantees who

held lands originally allotted to individual Indians subsequently claimed reserved water rights.

Adjudication of the Reservation's Reserved Water Right

After trial, the master recommended a decree granting an 1868 reserved water right for a variety of purposes, including agricultural uses which were quantified based on "practicably irrigable acreage" within the Reservation. The district court rejected any award for non-agricultural purposes and confirmed the master's recommended award based on "practicably irrigable acreage." [1] A closely divided Wyoming Supreme Court (3-2) increased the total award to 500,420 acre feet, Pet. App. A, pp. 56-58a.

Positions of the Parties Below

The United States and Tribes asserted an 1868 priority for a reserved water right based on an amount of water sufficient to irrigate all practicably irrigable acreage within the Reservation and for other broadly defined purposes. The State and most other parties, while acknowledging the Reservation's primary agricultural purpose, asserted that any reserved water should be quantified based solely on the amount of water which was necessary to ensure that the Reservation's primary agricultural purpose was not entirely defeated, to meet the Reservation's minimum needs, or to provide a moderate standard of living for the Indians.

Effect of the Decision Below Upon State-Awarded Water Rights

The adverse effect of quantification of the Reservation's reserved water right was well-documented below. The master devoted twelve findings of fact specifically to the effect of quantification of an 1868 Federal reserved water right upon pre-existing state-awarded water

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[1] Pet. App. D, pp. 169-172a, paragraph 1; *Id.*, at p. 172a, paragraph 2; *Id.*, at p. 168a, paragraph 3, and p. 182a.

rights.[2] In order to soften the effect of the reserved right,[3] the master limited development of the future projects' portion of the reserved water right to no more than 10% of the total reserved right in each decade following the decree, unless storage facilities were in place to provide all water necessary for Indian and non-Indian users. Pet. App. H, pp. 584a, 626a-627a. The district court originally agreed with the master's conclusion that state-awarded water right users would be damaged by the reserved water right and so found. Pet. App. F, p. 258a, Finding of Fact 98. On this basis, the district court ruled that upstream storage would be required to be in place to provide water for the additional acreage of each of the five future projects before *any* construction of the project could begin. Pet. App. F, p. 236a. Finding of Fact 98 and the storage requirement were, however, deleted by a subsequently-assigned different district judge who heard no additional evidence on the injury question. The closely divided Wyoming Supreme Court (3-2) rejected the storage limitation developed by the master and the district court. Pet. App. A, p. 71a. The court opined that the storage requirement was inconsistent with the object of the reserved water right which it described as a prior entitlement to the waters of the Reservation. *Id.* The dissent, however, would have gone beyond the protection offered by the storage requirement and denied the Federal reserved

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[2] Pet. App. H, pp. 688a-690a. *See also, id.* at 629a-630a. Among his findings, the master included that Congress intended and approved the appropriation system for Wyoming but that "today owners of water rights in Division 3 may suffer damages from an inability to put their rights to full use following the emplacement of an 1868 priority date for the Indians in the upper reach of the Wind River." Pet. App. H, p. 688a, Findings of Fact I.2.

[3] The master, while recognizing the injustice of his decision upon non-Indian users, seemed to believe himself powerless to limit quantification of the reserved water right due to injury to state-awarded water rights. The master thought that doing so would "be the imposition of a second wrong to atone for the first." Pet. App. H, p. 626a.

water right for the claimed future projects. Pet. App. A, p. 84a.

Subsequent Developments Not Disclosed by the Record

Though the future projects authorized by the decree below remain unbuilt, non-Indian water users have already felt the sting of the Tribes' reserved water right. On July 14, 1988, the Bureau of Indian Affairs, honoring for the first time a demand by the Tribes for delivery of their senior reserved water rights, closed and locked the headgates of all non-Indian irrigators on the Crowheart Irrigation Unit,[4] a part of the federally-funded Wind River Project on the Reservation. Cross-Pet. App., City of Riverton, *et al.*, Case No. 88-553 (hereafter "Riverton Pet. App."), p. 6a. The Tribes' demand[5] for delivery was respected despite the fact that the Canal was at near capacity, that at least 75 c.f.s. of water was running uncaptured in Dinwoody Creek at the Canal's headgate, and that non-Indian users on the Project are financially responsible for at least, if not more than, their *pro rata* share of annual Project maintenance and operation. Non-Indian irrigators quickly

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[4] Because the Unit's supply canal lacks the capacity to deliver water to all lands within the Unit at one time, the Bureau has historically rotated water between its upper and lower reaches in order to provide all users with an equivalent supply, a common practice in the West.

[5] While the Tribes' only 1988 demand was for irrigation water, the Tribes also announced their intent to devote portions of their future project reserved water right, though quantified solely for agricultural uses, to the maintenance of instream flows and lake levels for fisheries purposes in Bull Lake Creek and Bull Lake Reservoir. Doing so would substantially preempt non-Indian irrigation within the federally-funded Riverton Irrigation Project, which is operated by the Midvale Irrigation District, despite the fact that the act authorizing the construction of Bull Lake Reservoir specifically devoted its use to the Riverton Project and restricted the rights of the Tribes with respect to the use of lands associated with the reservoir. 43 U.S.C. §§ 597a and 597c. The seriousness of the Tribes' intention was underscored on September 22, 1988, when an armed contingent of Indian officials ordered the District's dam tender from the Reservoir and blocked the road to the dam.

filed petitions to enjoin the Bureau's actions, under the case number assigned this matter below. Riverton Pet. App. p. 2a, *et seq.* These were denied. On July 29, 1988, the Tribes and Wyoming agreed jointly to recommend management alternatives to the Bureau which would allow non-Indians again to divert. On August 2, 1988, the practice of rotation was resumed, after leaving non-Indian irrigators on the Crowheart Unit without water for three weeks in the exceedingly hot and dry Wyoming summer of 1988. Riverton Pet. App., p. 1a.

The Tribes' 1988 interference with non-Indian uses, historically of equal seniority to their own, and their expressed intent to convert the massive future project award to instream uses, recently prompted Wyoming to enter an interim one-year agreement with the Tribes by which Wyoming has agreed to forego tax revenues from the Reservation and provide other funds in the amount of $5,500,000, simply to prevent the Tribes' enforcement of their Federal reserved water right during 1989.[6] The total amount foregone by Wyoming in 1989 is more than double the Tribes' recent *total* annual crop production on Indian lands, including those leased to non-Indians.[7]

SUMMARY OF ARGUMENT

The question before the court concerns the appropriate standard of quantification of the implied federal reserved water right for agricultural[8] Indian reservations, typi-

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[6] In exchange, the Tribes will share surpluses and shortages of available water with non-Indians in accordance with historical irrigation practices on the Reservation.

[7] According to reports of the Bureau of Indian Affairs, the value of total crop production in 1985 was 1.9 million dollars, in 1986, 2.4 million dollars, and in 1987, 2.2 million dollars.

[8] Agricultural Indian reservations are those which were established for the purpose of converting nomadic peoples to a pastoral life, e.g. to create an independent farming community as in the case of the Wind River Indian Reservation. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 117-18 (1937), hereinafter *"Shoshone."*

cally set aside during the nineteenth century, well before significant irrigation water rights were obtained from the states by non-Indian settlers in the West. In 1963, this Court provided that the reserved water right would be in the amount of water required to irrigate all the "practicably irrigable acreage" (PIA) on such reservations. Subsequently, for other types of reservations (Indian and non-Indian), the Court affirmed reserved rights in natural resources only in the amounts *necessary* to meet the reservation's minimal needs,[9] to ensure that the primary reservation purpose was not entirely defeated,[10] and to provide a moderate living[11] for its Indian residents. These two substantially different quantification approaches[12] have caused conflicts and confusion among the lower courts and, as a result, this Court granted certiorari to the Supreme Court of Wyoming to review the following question:

> In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the reservation, may a reserved water right be implied for all practicably irrigable lands within a reservation set aside for a specific tribe?

This Court should now confirm that the same concepts of necessity which are applicable to all other types of reservations apply equally to agricultural Indian reservations. In doing so, the Court should provide an approach to quantification by the trial courts which allows them to

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[9] *Cappaert v. United States*, 426 U.S. 128 (1976), hereinafter *Cappaert*, national monument water rights.

[10] *United States v. New Mexico*, 438 U.S. 696 (1978), hereinafter *New Mexico*, national forest water rights.

[11] *Washington v. Washington State Commercial Fishing Vessel Association*, 443 U.S. 658 (1979), hereinafter *"Fishing Vessel,"* Indian fishing resource.

[12] Interestingly enough, in the recent cases, the Court referred to the earlier cases which established the practicably irrigable acreage standard as support for the limitations based on necessity which were later imposed on the reserved right.

fairly and equitably tailor the reserved right doctrine to the needs of individual reservations. More specifically, in this matter, the Court should: (1) answer the question presented in the negative, (2) reverse the decision of the Wyoming Supreme Court that the reserved water right for the Wind River Indian Reservation is quantified in an amount required to irrigate all of the practicably irrigable land on the Reservation, and (3) remand with instructions to enter a decree for a reserved right in an amount necessary to irrigate those Reservation lands which have previously been irrigated but which are without a state water right.

I. Early in this century, this Court created [13] the "reserved water right doctrine" to remedy serious oversights by the other two branches of government. By doing so, it judicially provided what Congress or the President neglected for land reservations, i.e. enough water to carry out the primary purpose of the reservation. Initially applied to Indian reservations, and more recently applied equally to other federal reservations,[14] the reserved right doctrine had the effect of allowing the United States, whether in its proprietary or fiduciary capacity, to go to the head of the line of all water users, bypassing and receiving water ahead and to the detriment of previously senior users whose water rights were established under state law after the date of the land reservation. Because of their retrospective nature, Federal reserved water rights seriously alarmed existing water users and the states which had granted them water rights.[15] Nevertheless, through approximately the mid-

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[13] *Winters v. United States*, 207 U.S. 564 (1908). Consequently, the ensuing body of law is frequently also referred to as the "*Winters* doctrine."

[14] *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), federal power withdrawal; *Arizona v. California*, 373 U.S. 546 (1963), hereinafter *Arizona I*, national forests and wildlife refuges; *Cappaert*, national monument; *New Mexico*, national forest.

[15] Initially, the principal problem faced by existing water users was the inability to determine the scope and nature of the ubiqui-

1960's, the Federal doctrine continued to expand to the detriment of non-federal water users and state water resources planning in the arid western states. Finally, as in the case of many other developing federal doctrines, the pendulum began to return towards a central position in the 1970's. In three landmark cases, this Court announced that it would carefully scrutinize awards of federal reserved natural resources rights to insure that they were only in those amounts necessary to meet the reservations' "minimal needs," *Cappaert*, 426 U.S. at 141, to prevent the reservations' "primary" purpose(s) from being "entirely defeated," *New Mexico*, 438 U.S. at 700, and to provide reservation Indians a "moderate living." *Fishing Vessel*, 443 U.S. at 686.

II. Although this careful attention to the amount of the Federal reserved water right was welcomed by western water users, significant difficulties remained with the reserved right for agricultural Indian reservations. During the early and mid-1900's, the Federal trial courts,[16] state supreme courts[17] and Federal appeals courts[18] were inclined to protect water rights of agricultural Indian reservations, but only to the amount of reasonably feasible needs. When there had been ample opportunity for agricultural development, however, the re-

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tous reserved water right. The United States' success in asserting sovereign immunity eventually led to the adoption of the McCarran Amendment in 1952, now codified at 43 USC § 666, under which that defense was waived in general adjudications of water rights. *See United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971), hereinafter *Eagle County; United States v. District Court in and for Water Division 5*, 401 U.S. 527 (1971), hereinafter *Division 5; Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), hereinafter *Colorado River*; *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983).

[16] *United States v. Wrightman*, 230 F. 277 (D. Ariz. 1916).

[17] *Byers v. Wa-Wa-Ne*, 86 Or. 617, 169 P.121 (1917).

[18] *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939).

served water right was quantified based on historical experience. In 1963, however, this Court established what appeared to be a rigid and universal standard in *Arizona I*, 373 U.S. at 600-601. For five agricultural Indian reservations on the lower Colorado River, the Court approved the use of the "practicably irrigable acreage" standard for the quantification of the reserved water right. Under that standard, reserved water rights for those agricultural reservations were based on the amount of water required to irrigate all of the practicably irrigable land within each reservation. The rationale for that standard was that it was convenient, relatively easy to apply, provided water for current and future needs of the reservations and provided a much-needed certainty of the amount of the reserved water right.

III. While the PIA standard may have made sense for those Colorado River reservations [19] and in spite of this Court's 1983 reaffirmation of the standard *for those reservations*,[20] the standard's subsequent application to other reservations has not been satisfactory. In general, the "practicably irrigable acreage" standard not only creates problems of proof but also results in the award of water rights far in excess of the needs of a reservation's primary purpose (usually through awards for hypothetical "future" irrigation projects) and causes massive dislocations among water users under state law. For example, in the adjudication below, the amount of "practicably irrigable acreage" on the Wind River Reservation was roughly twice the amount of land historically irrigated by large government irrigation projects constructed during 1905-1920. During the same period, state water rights were acquired pursuant to Congressional direction for those existing projects and for other Indian lands

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[19] Originally having been set aside for unknown Indian tribes of uncertain future water requirements.

[20] *Arizona v. California*, 460 U.S. 605 (1983), hereinafter *Arizona II*, in which concepts of *res judicata* precluded the Court from reexamining the "practicably irrigable acreage" standard. *Id.* 460 at 625-626.

within the Reservation. The vast new award now prompts the Reservation's Tribes to seek permission to sell or export their excess water from the reservation and to change excess water to non-agricultural purposes. That water historically had been used by non-Indians who, individually or as part of federal projects, had been induced by the United States to settle in and around the Reservation and to obtain water rights under state law. In other words, the quantification of the reserved water right for agricultural Indian reservations was a difficult problem for which a simple solution, the "practicably irrigable acreage" standard, was devised. Unfortunately, however, regardless of its deceptive straight-forwardness, use of the "practicably irrigable acreage" standard in this adjudication provided an unanticipated windfall to the Tribes and caused an injustice to their non-Indian neighbors.

IV. The complexity and flexibility required to quantify Indian reserved water rights has not escaped the attention of this Court. Nevertheless, the two distinct lines of cases with differing approaches to quantification (maximization v. minimization) have caused untold confusion in the lower courts, a confusion which this Court now has an opportunity to resolve. Without violating the principles announced in either line of cases, this Court should establish an approach to quantification which allows trial courts the flexibility necessary to fashion varying awards of water to agricultural Indian reservations in varying circumstances. Instead of requiring lower courts to adhere to the "practicably irrigable acreage" standard, this Court should specify those *factors* to be considered when tailoring a reserved right award for any particular agricultural reservation, including: the extent of its historic irrigation; lands which could have been reasonably foreseen to be irrigated at the time of this reservation but have not yet been irrigated; the state awarded water rights which have been granted for Indian agricultural use on the reservation; non-irrigation agricultural needs of the reservation; and the impact of the reserved water

right on non-Indians using water under state law. Evidence on these factors will allow the trier of fact to reach a quantification which insures that the reservation's minimal agricultural needs are met, that its primary purpose will not be entirely defeated, and that its Indian residents maintain a moderate standard of living, all as circumscribed by the need for the sensitive application of the reserved water right doctrine as mandated by this Court in *New Mexico*.

Indian Tribes inevitably will point out that the primary agricultural purpose of such a reservation is now outmoded, i.e. that it may be impossible to generate a moderate living for its Indian residents based solely on agriculture. Although that may well be true, relief from that difficult situation is appropriately sought from the Congress or the Executive, whichever established a reservation, and not from the Judiciary. If current circumstances have outmoded a reservation's original purpose, Congress or the Executive should expand the purposes. If the expanded purposes require additional water, a new reserved water right with a recent priority date may be expressly created or appropriate state-awarded water rights secured. If the new rights are insufficient to provide all water needed by the new purposes, public funds may be expended to acquire the existing water rights of others. Under any circumstances, water for secondary uses should be obtained under state law.

ARGUMENT

I. The Federal Reserved Water Right Doctrine Was Created By This Court As A Safety Net Or Insurance Policy To Cure Retroactively Congressional And Executive Oversights Which Threatened To Leave Certain Indian Reservations Without Necessary Water. Water Rights Should Not Be Granted Under The Doctrine When There Is No Demonstrated Need For Reserved Water In Addition To That Water Which Is Available To A Reservation From State Water Rights Which Were Acquired Pursuant To Congressional Direction.

The doctrine of Federal reserved water rights, or *Winters* doctrine, was created shortly after the turn of this century by Federal courts to repair oversights by Congress and the President. When reserving or withdrawing public domain lands from private entry, the executive and legislative branches of the federal government often neglected to reserve water for the withdrawal or otherwise to secure water to serve the reservation's needs. In water-short areas, this oversight bore the seeds of potential disaster since subsequent appropriators continued to perfect water rights, under state law, thereby depriving the federal land reservation of essential and necessary water.[21]

As most recently defined by this Court in *New Mexico*, such an implied water right is created under Federal law only to serve the *primary* purpose of a land reservation, a national forest in that case. On the other hand, water rights for secondary purposes or uses are to be obtained under state law. The implied reserved water right is

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[21] In a series of opinions beginning in 1908, this Court announced and began to define this curative concept in a series of decisions which provided that, long after the actual creation of a Federal reservation, the courts may create or newly recognize an implied reservation of water to accompany the earlier express reservation of land. To circumvent the water rights of intervening appropriators under state law, the implied reserved water right was given a retrospective priority as of the date of the land reservation. *Winters*, 207 U.S. at 564.

quantified for only that amount necessary to insure that the primary purpose is not entirely defeated, to meet the "minimal needs" [22] of the primary purpose and, perhaps, to provide Indians with "a moderate living" standard.[23] Since the "priority" of the reserved right is generally the date on which the land reservation was made for the reservation's primary purpose, the reserved right will "antedate" subsequent appropriations of water under state law, even though those appropriations often precede actual use of reserved waters by decades, thereby precluding state appropriators from continuing their own uses, so as to make water available to carry out the purposes of the land reservation. Because of the potential injustice of this involuntary judicial transfer of water from individual appropriators to Federal reservations, the *New Mexico* Court unanimously applied the reserved right doctrine "with sensitivity to its impact upon those who have obtained water rights under state law and Congress' general policy of deference to state water law." [24] Those subsequent cases, to be sure, dealt with reservations other than agricultural Indian reservations. Nevertheless, it is long settled that the same reasoning under which Federal courts created implied reserved water rights for Indian reservations is precisely appli-

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[22] *Cappaert*, 426 U.S. at 141, involving a national monument, and marking "a turning point in the Court's reserved rights jurisprudence." Fisher, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 Cornell L. Rev. 1077, 1085 (1984).

[23] This Court recently announced that, with regard to Indian reservations, natural resources are to be allocated in such a way as to provide a "moderate living" for the Indian residents of the reservation. *Fishing Vessel*, note 11, above, 443 U.S. at 686-687. Although *Fishing Vessel* dealt with Indian fishing rights, its teachings have been applied to Indian reserved water rights. *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983), *cert. denied sub nom., Oregon v. United States*, 467 U.S. 1252 (1984).

[24] *New Mexico, supra*, 438 U.S. at 718 (Powell, J., concurring and dissenting).

cable to non-Indian reservations.[25] *Arizona I*, 373 U.S. at 601.

In the instant case, the Wind River Indian Reservation was established by treaty in 1868, *without* an express reservation of water. As a practical matter and as observed by the state-court master below, at that time Congress probably gave no thought whatsoever to the legal basis of the Reservation's water supply. Tr. 53 (10/23/80). By 1905, however, Congress directed the:

> . . . surveying, platting, making maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said lands as shall remain the property of said Indians, whether created within the territory intended to be ceded by this agreement or within the diminished reserved.

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[25] When the United States itself is defending against *Winters* claims, it is not bashful about imposing the concepts announced by this Court in *Cappaert*, *New Mexico*, and *Fishing Vessel*:

> Promotion of "habits of industry and thrift" (207 U.S. at page 567 [*Winters*]) is not realized by making available a plethora of water by means of which the Pima-Maricopa Indians could become a leisure class of non-farming landlords reaping at ease the fruits of labor not their own. The Winters Doctrine was designed to provide Indians with the opportunity, in the form of irrigation water, whereby they could help themselves become proficient farmers. Thus, by using the reserved water as the means for progress, they would acquire 'habits of industry and thrift." This would enable them to compete more effectively with non-Indian irrigation farmers.

Gila River Pima-Maricopa Indian Community v. United States, before the Indian Claims Commission, Docket No. 236-C, Defendant's [United States'] Objections to Plaintiff's Requested Findings of Fact; Defendant's Requested Findings of Fact; and Brief on Loss of Use of Water, April 1978, at 299-300. In that proceeding, the United States argued, "*Cappaert* interpreted and applied the Supreme Court's decision in [*Arizona I*] as limiting the *Winters* Doctrine. . . ." *Id.*, p. 20.

Pet. App. X, p. 778a-779a. Nevertheless, seventy-five years later in the adjudication below, the United States and Tribes claimed implied reserved water rights for the Reservation.

In reviewing those claims, the initial task for the Wyoming courts was to identify the Reservation's primary purpose,[26] which was found to be solely agricultural. This finding was, of course, based primarily on the words of the Treaty, which describe the Wind River as one of two "agricultural reservations." Pet. App. AA, p. 798a.[27]

The issue now before the Court is whether the Wyoming Supreme Court properly quantified an implied Federal reserved water right for the Wind River Indian Reservation, one hundred and twenty years after its creation for agricultural purposes. The award below was based solely on the Reservation's total amount of "practicably irrigable acreage," some 100,000 acres. This was far in excess of the Reservation's abundant his-

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[26] Although the United States and Tribes asserted an all-inclusive "permanent homeland" purpose for the Reservation, the evidence was surprisingly uniform that, while the Reservation was of perpetual *duration*, its primary *purpose* was agricultural. The Tribes' own exhibits demonstrated the Shoshone Tribe's expectation of, indeed desire for, an agricultural reservation prior to 1868. Tribes Exs. OCS-7, p. 170; OCS-22, p. 639; OCS-24, p. 82; OCS-33, p. 5 (handwritten), p. 2 (typewritten); and OCS-50, p. 104. Tr. 9209-9210, Testimony of Tribes' expert Omer C. Stewart. The Shoshones' desire was fulfilled with reservation of the Wind River Valley to which they were allowed to go in order "to grow wheat and corn, and raise cattle and horses, so that when the game is gone you will be prepared to live independently of it." Tribes Ex. OCS-24, at 82.

[27] Because of the language of the treaty itself and the "ample evidence and testimony addressed," the Wyoming Supreme Court had "no difficulty affirming the findings of the district court" that the Reservation's purposes were solely agricultural. Pet. App. A, p. 38a. The Wyoming Supreme Court was comforted by finding its interpretation to be consistent with that of this Court which held that, taking the Treaty as a whole, its purpose was "to create an independent permanent farming community upon the reservation." *Shoshone*, 304 U.S. at 117-118.

torically irrigated acreage for which water rights long ago had been obtained from the state of Wyoming. The award was made without evidence that, in addition to that available under state rights, water was necessary to meet the Reservation's minimal agricultural needs or to prevent the defeat of its primary agricultural purpose. In addition, the quantification was made without "sensitivity" to its impact on users of other state water rights and to Congress' express deference to state water law. In these respects, the Wyoming Supreme Court's decision is erroneous and should be reversed.

II. The "Practicably Irrigable Acreage" Quantification Standard, Established In *Arizona I*, Should Be Limited In Its Application To Only Those Agricultural Indian Reservations For Which There Is No Other Means To Quantify The Federal Reserved Water Right Necessary To Effectuate Their Primary Agricultural Purpose.

A. Early quantifications under the Federal reserved water right doctrine were based on an agricultural Indian reservation's reasonably foreseeable needs. Where these needs were not foreseeable, this Court established the "practicably irrigable acreage" quantification standard in *Arizona I*.

That the quantification of a reserved water right is limited to that water reasonably necessary for federal purposes is inherent in the tradition and law of the reserved right doctrine. Perhaps the earliest suggestion of the power of the United States to reserve water from appropriation under state law to meet federal needs is found in *United States v. Rio Grande Irrigation Company*, 174 U.S. 690 (1899), hereinafter "*Rio Grande*."[28]

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[28] In *Rio Grande*, in a statement which was a precursor to the eventual elaboration of the reserved right doctrine, the Court made it clear that "a State cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its water; so far at least as may be necessary for the beneficial uses of the government property." 174 U.S. at 703.

A few years later, in a matter arising out of the ninth circuit, this Court made its first definitive statement of the reserved right doctrine in *Winters*. By refusing to accept the contention that the Indians of the Fort Belknap Reservation relinquished the waters which would make the Reservation "valuable or adequate" for its agricultural purpose, the Court established that the reserved right should be based on a reservation's need.[29] Thereafter, the ninth circuit frequently based its awards of Indian reserved water rights on reservations' foreseeable needs. When there had been ample opportunity for substantial completion of development on a reservation, e.g., when there had been a long history of irrigation, the foreseeable needs were considered as being identical to historic use. *Conrad Investment Company v. United States*, 161 F. 829 (9th Cir. 1908), hereinafter "*Conrad.*"[30] *United States v. Walker River Irrigation*

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[29] *Winters*, 207 U.S. at 576. The decision of the Court of Appeals in *Winters v. United States*, 143 F. 740 (9th Cir. 1906) did, however, address the scope of the reserved water right when it affirmed the trial court's opinion that the United States had "reserved the right to use the waters of the Milk River, at least to an extent reasonably necessary to irrigate" the Reservation's lands. 143 F. at 749. In this context, the Ninth Circuit considered the extent of existing irrigation on the Ft. Belknap Reservation in upholding the reserved water right. 143 F. at 741. While it would perhaps have been inappropriate in 1906 permanently to decree a reserved water right limited to the Indians' then historical irrigation practices, irrigation on the Reservation having begun in only 1898, the Court's affirmation protected existing irrigation alone.

[30] Citing *Winters*, the *Conrad* court determined that the Indians of the Blackfeet Indian Reservation had reserved waters "to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes." 161 F. at 831. To an even greater degree than the Ninth Circuit's decision in *Winters*, the Court examined, and limited its order to protection of, existing irrigation on the Blackfeet Reservation. Historical irrigation practices were of primary concern to the Court. 161 F. at 832-834. The *Conrad* court left open its decree for modification, should conditions on the Reservation at any time require such. There is no suggestion in the opinion, however, that modification would be appropriate only if the Indians' needs should increase. Furthermore, as on the Fort Belknap Reservation, irrigation on the

District, 104 F.2d 334 (9th Cir. 1939), hereinafter "*Walker River*," [31] *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied, sub. nom. Ahtanum Irrigation District v. United States*, 352 U.S. 988 (1957), hereinafter "Ahtanum." [32]

When this court again dealt with the question, it addressed the reserved water rights of five agricultural Indian reservations on the lower Colorado River. Since the future requirements of those reservations were uncertain, the Court rejected the contention that the amount

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Blackfeet Reservation had begun only in 1898, resulting in an irrigation history of only ten years at the time of the *Conrad* decision.

[31] In *Walker River*, the Ninth Circuit continued the practice of limiting Indian reserved water rights to those reasonably necessary to fulfill a Reservation's purpose. Finding that creation of a reserved water right was needed for the agricultural purpose of the Walker River Reservation, the court held "that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians." 104 F.2d at 339-340. As the measure of the Tribe's reasonable irrigation needs, the ninth circuit, noting that "the extent to which the use of the stream might be necessary could only be demonstrated by experience," focused on the historic irrigation practices on the Reservation, which had begun as early as 1886, and which had resulted in irrigation of 2100 acres of land at the time of trial. 104 F.2d at 340. The court accepted the historical irrigation experience of the Reservation as "a fair measure of the needs of the Government" and limited its quantification accordingly. 104 F.2d at 340. *Walker River* presents the natural extension of both *Rio Grande* and *Winters*, upon which it relied, both in the quantification standard which it accepted and the application of that standard by long historical reference.

[32] In *Ahtanum*, the Ninth Circuit added another link to its unbroken analytical chain when it accepted "reasonable necessity" as the applicable quantification standard and when it applied that standard within the framework of the reservation's historical irrigation experience. 236 F.2d at 326. Consequently, the Ninth Circuit refused to limit the reserved water right to serve that reservation acreage under irrigation in 1908, but instead extended the right also to include the Indians' needs "in 1915, when the Indian ditch system had been completed." 236 F.2d at 337. The irrigation system for the Wind River Reservation has been substantially complete since the early 1920's.

of the reserved water right should be measured by the Indians' "reasonably foreseeable needs." *Arizona I*, 373 U.S. at 600-601.

B. The "practicably irrigable acreage" quantification standard in *Arizona I* was necessitated by the facts applicable to the reservations in that case. The standard should not be employed for dissimilar reservations for which needs are demonstrated by historical development and satisfied by state-awarded water rights.

In *Arizona I*, this Court quantified sufficient reserved water to irrigate the reservation's "practicably irrigable acreage." In so doing, the Court was careful to note that this quantification standard was the only "feasible and fair" means to measure the reserved water right for the reservations involved. 373 U.S. at 600-601. For the Wind River Indian Reservation which is now before the Court, however, such a standard is neither feasible nor fair. There are at least three obvious distinctions between the *Arizona I* reservations and the Wind River Indian Reservation. First, unlike the *Arizona I* reservations, the Wind River Reservation is *not* comprised of lands ". . . of the desert kind—hot, scorching sands. . . ." [33] Instead, the Wind River Reservation [34] comprises

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[33] Referring to the five reservations there involved, the *Arizona I* Court, 373 U.S. at 598-599, observed:

> Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress [and the Executive created them] they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.

[34] In 1905, prior to significant irrigation on the Wind River Indian Reservation, the Commissioner of Indian Affairs described

"the best-watered portion of Wyoming." *Shoshone*, 304 U.S. at 114. Second, unlike the Indians in *Arizona I* who were "put on . . . reservations . . . not considered to be located in the most desirable area of the Nation," the Shoshone had long fought with the Crows for control of the Wind River Valley and, in return for their support of the United States, received the Wind River Reservation as a gift.[35]

Finally, the *Arizona I* reservations were set aside for use "in the indefinite future to satisfy the needs of Indian tribes in the United States as those needs might develop." *Arizona v. California*, Special Master's Report, December 5, 1960, hereinafter "*Arizona I* Master's Report," at p. 262. As a result, Special Master Rifkind concluded, and this Court agreed, that the unforeseeable water needs of future Indian inhabitants of these reservations had to be protected by a large award of water based on the amount "sufficient . . . to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses."[36] The Special Master nevertheless acknowledged, "Whatever might be pos-

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the diminished portion of the Reservation as being ". . . the garden spot of that section of the country. . . ." Wyo. Ex. WRIR I & P 9, at p. 5.

[35] Tr. 9232.

[36] *Arizona I* Master's Report, at p. 262. The special master described his reasoning as follows: "At the times of the creation of the five Indian Reservations in question, it was impossible to predict the future needs of the Indians who might inhabit them. Indeed, in some instances it was not clear which Indian tribes would ultimately be settled on a particular Reservation. What the United States did, in withdrawing public lands for these Indian Reservations was to establish areas that could be used in the indefinite future to satisfy the needs of Indian tribes in the United States as those needs might develop. Only by reserving water in this manner could the United States ensure that the Reservation lands would be usable when needed to support an Indian economy." *Id.* "It is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements." *Id.*, at p. 263.

sible in a case involving solely the issue of the reserved rights of a single Indian Reservation, it would not be possible to predict future Reservation needs in this litigation." *Id.* at 264-265, footnote omitted.[37] In the case at bar, the Wind River Indian Reservation was set aside *specifically* for the Shoshone Indians. Only later were the Arapaho forcibly relocated to the Reservation, an injustice for which the Shoshone were eventually compensated by the United States. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937). Consequently, the "practicably irrigable acreage" quantification standard of *Arizona I* should not be universally applied to all agricultural Indian reservations, particularly those which do not fall into the peculiar circumstances of the five *Arizona I* reservations.

The *Arizona I* dispute was again addressed by this Court in *Arizona v. California*, 460 U.S. 605 (1983), hereinafter *Arizona II*, in which the United States and Tribes sought an increase in their reserved water right. The States, on the other hand, suggested that the Court should reconsider the "practicably irrigable acreage" standard. To preserve the certainty of its previous decree *in that case*, this Court refused to reopen the quantification issue.[38] By foreclosing relitigation of the "prac-

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[37] In that footnote he stated, "Even in such cases, courts have not attempted to bind the Indians on the basis of a prediction as to future needs." *Conrad*, which is discussed at note 30, above, refused to limit the Indian reserved right to historical use when the period of historical use had been quite short, only 10 years. In contrast, on the Wind River Indian Reservation, there has been full irrigation development at present levels for at least sixty years.

[38] "We also fear that the urge to relitigate, once loosed, will not be easily cabined. The States have already indicated, if the issue were reopened, that the irrigable-acreage standard itself should be reconsidered in light of our decisions in [*New Mexico, supra, Fishing Vessel, supra*], and we are not persuaded that a defensible line can be drawn between the reasons for reopening this litigation advanced by the Tribes and the United States on the one hand and the States on the other. It would be counter to the interests of all parties to this case to open what may become a Pandora's Box,

ticably irrigable acreage" quantification standard, based on concepts of *res judicata* applicable in that case, this court did not preclude reconsideration of whether that quantification standard should be applied to other agricultural Indian reservations existing under different contemporary and historical circumstances.

C. To resolve the confusion over the reserved water right quantification standard for agricultural Indian reservations, this Court should limit the applicability of its holding in *Arizona I* to those agricultural Indian reservations for which the practicably irrigable acreage standard is the only measure of the amount of water needed for the reservations' primary agricultural purpose.

Because of the apparent distinction between the reserved water right quantification standard announced in *Arizona I* and *II* (practicably irrigable acreage) and that more recently announced in *New Mexico* (necessity), understandable confusion exists in the courts below over the standard which now should be applied to agricultural Indian reservations. For example, at the urging of the United States, the Claims Court recently hedged its bets in concluding that "practicably irrigable acreage" *is* the standard, *but* that the standard is now subject to a "restrictive interpretation" based on concepts of necessity. *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 626 (1987). The Wyoming Supreme Court, on the other hand, analyzed this Court's decisions, failed to find any such "restrictive interpretations," and concluded that *Arizona II* conclusively reaffirmed the original "practicably irrigable acreage" standard announced in *Arizona I*, without regard to any concepts of necessity.[39]

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upsetting the certainty of all aspects of the decree. These considerations, combined with the practice in our original cases and the strong res judicata interests involved, lead us to conclude that the irrigable-acreage question should not be relitigated." *Arizona II, supra*, 460 U.S. at 625-626.

[39] Pet. App. A, p. 47a: The Wyoming Court held: "The measure of the Tribes' reserved water right is the water necessary to irrigate

In the absence of clarification and resolution by this Court, the confusion already apparent in the lower courts will inevitably expand. The Court should take this opportunity to unequivocally explain that the "practicably irrigable acreage" standard was adopted for the *Arizona I*, reservations and that it has no applicability to any other agricultural Indian reservation, *unless* it can be demonstrated that the standard provides for the quantification of only that water necessary to meet agricultural minimal needs and to insure that the primary agricultural purpose is not entirely defeated.

III. The "Practicably Irrigable Acreage" Standard For The Quantification Of Federal Reserved Water Rights For Agricultural Indian Reservations Should Be Discarded Since Its Results In Unjustified Windfalls For Indian Reservations, It Disregards This Court's "Sensitivity Doctrine." And Its Inflexibility Carries With It Inherent Problems Of Proof.

The Wind River Reservation in Wyoming enjoys a history of extensive irrigation development pursuant to state awarded water rights. Between 1905 and 1915, pursuant to express Congressional direction, some 145,000 acres of land of the Wind River Reservation were awarded state water rights for the benefit of the Indians. This amount of irrigated land soon proved to be far more than was needed. By 1963, state water rights

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the practicably irrigable acreage on the reservation. In [*Arizona I*], a needs test was rejected as too uncertain, the Court opting instead for practicably irrigable acreage as the measure of a tribal agricultural reserved water right. Two subsequent non-Indian reserved water right cases [*Cappaert, New Mexico*] indicate that necessity is the measure of a reserved water right. And in [*Fishing Vessel*], the Court recognized the propriety of reducing the Indians' proportion of the fish harvest as their needs diminished. Nonetheless, the Court declined the invitation to re-examine the PIA standard in [*Arizona II*] and reaffirmed the value of the certainty inherent in the practicably irrigable acreage standard. The district court was correct in quantifying the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage."

for 40% of that land had been voluntarily relinquished, leaving 87,000 acres under state water rights. Based on the practicably irrigable acreage standard, however, the Reservation's reserved water rights were quantified based on 102,000 acres of irrigable acreage, of which no more than 54,200 acres had *ever* been historically irrigated, though never all in one season. In other words, after the infusion of massive amounts of congressionally mandated expenditures for the construction of irrigation projects, the total historic practicably irrigable land base of the reservation was 54,200 acres. That was land which had been irrigated at least once, but never all at the same time, requiring some 290,500 acre feet of water annually.[40] Nevertheless, under the Wyoming Supreme Court's decision below, the reserved water right awarded was 500,400 acre feet [41] or 72% greater than historical needs. This total amount was awarded in the absence of any evidence showing that the water was necessary to meet the minimal needs of the Reservation or to insure that its primary agricultural purpose was not entirely defeated. The Wyoming courts, misapprehending the "practicably irrigable acreage" standard of *Arizona I*, awarded reserved water rights not only for historically irrigated lands, which were already the subject of state-awarded

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[40] Historic practicably irrigable acres and the reserved water right based thereon were: 37,284 acres and 16,932 acres for which 207,641 acre feet and 82,849 acre feet were awarded, Pet. App. D, pp. 172a, 182a, for a total of 54,221 acres of historic land for which 290,490 acre feet were awarded a Federal reserved water right.

[41] Future practicably irrigable acreage and the reserved water right based thereon awarded by the district court were: 48,097 acres and 423 acres for which 186,990 acre feet and 1,947 acre feet were awarded, Pet. App. D, pp. 172a, 182a, for a total of 48,520 acres of future land for which 188,937 acre feet were awarded as a reserved water right by the district court. The Wyoming Supreme Court reversed a 10% reduction of the future award by the district court, Pet. App. A, pp. 56a-58a, thereby increasing the district court's award by 20,993 to 209,930 acre feet. The total award by the Wyoming Supreme Court, for both historic and future acreage, was 500,420 a.f.

water rights, but also for yet to be constructed "future" projects which were designed solely for the purpose of obtaining the quantification of reserved water rights in this adjudication.

This drastic result is in stark contrast to the decisions of other courts which have dealt with Indian reservations on which there has been ample time to reach full irrigation development. For example, the Ninth Circuit has twice addressed the quantification standard for the reserved water right for an agricultural Indian reservation for which there is a lengthy history of irrigation development. On the Walker River Indian Reservation in Nevada, there had been no showing of "the *necessity* or demand for the cultivation of a larger area than 2,100 acres," for which 26.25 second feet of water was found to be sufficient. *Walker River*, 104 F.2d at 340. The Ninth Circuit consequently limited the reserved water right to that precise amount "as a fair measure of the needs of the government as demonstrated by seventy years' experience." *Id.*, at pp. 339-340.[42] On the Yakima Indian Reservation in the State of Washington, the United States entered into an agreement with neighboring non-Indian irrigators in 1908 which limited the Indians' use of water from Ahtanum Creek. The Ninth

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[42] The Ninth Circuit stated: "We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians. There remains for decision the question as to the quantity to which the United States is entitled. The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it. The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary could only be demonstrated by experience. . . . We are constrained to accept this estimate [26.25 c.f.s.] as a fair measure of the needs of the Government as demonstrated by seventy years' experience. . . . So precious is every miner's inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it." *Walker River*, 104 F.2d at 339-340.

Circuit felt constrained to uphold the validity of the agreement but, nevertheless, described the Indians' reserved water right as being in that amount required to provide for the Indians' reasonable needs, as measured upon the completion of the Reservation's water project. *Ahtanum*, 236 F.2d at 337.

A. The "practicably irrigable acreage" quantification standard creates a windfall for the United States as well as for agricultural Indian reservations.

The Wyoming Supreme Court, based on *Winters*, awarded reserved water rights for the Wind River Indian Reservation, notwithstanding express Congressional deference to Wyoming law in 1905 for the acquisition of the Reservation's irrigation water rights and Congress' refusal expressly to reserve water for the Reservation.[43] In 1963, however, the United States acquiesced in the expiration of a substantial portion of those Wyoming water rights, leaving some 87,000 acres to be irrigated under Wyoming state law. In the instant adjudication, which commenced in 1977, the United States claimed and was awarded reserved water rights based on over 100,000 acres of practiably irrigable acreage, much of which was already the subject of state-awarded water rights acquired pursuant to the 1905 Act.

If that surrender was of state water rights needed by the Reservation, the subsequent award of Federal reserved

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[43] In deliberations preceding the Act of March 3, 1905, ratifying the 1904 Agreement between the United States and Tribes, Congress *expressly* directed that all actions be taken "as are required by the statutes of the State of Wyoming in securing water rights from said State" for the Reservation. Pet. App. X, p. 772a. Accordingly, water rights under Wyoming law were subsequently acquired by the United States for the irrigation of some 145,000 acres on the Reservation. In 1914, the Office of Indian Affairs unsuccessfully requested that Congress specifically create reserved water rights for the Reservation. The proposed creation of reserved rights was said to be necessitated by the Act of March 3, 1905, 33 Stat. 1016, 1020, which "practically nullified" the applicability of the *Winters* decision to the Reservation.

water rights represents a remarkable and undeserved benefit to the United States. In effect, rather than compensating the Indians for state water rights which were lost, the United States sought and now has been awarded an even more senior reserved water right to irrigate yet more land, thereby shifting the economic loss from the public treasury to formerly senior water users under Wyoming laws.[44]

The award of reserved water rights represents a substantial windfall to the Tribes as well. There is no evidence that *any* reserved water is necessary to ensure that the Reservation's primary purpose is not entirely defeated. Since the record is also devoid of any evidence that the Tribes complained of the surrender of 40% of their state-awarded water rights, it can only be presumed that the water they produced was not needed.[45] In light of the Tribes' cross-petition filed in this matter,[46] little argument remains that the amount of the reserved water right award was far in excess of the Reservation's minimal needs. The Tribes presented the following question to the Court:

> Whether, under the Treaty, the Tribes are restricted from exporting their reserved water off the Reserva-

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[44] The Federal reserved water right doctrine ". . . is not a source of power authorizing of itself any federal action; its only function is to shield the United States from payment of compensation to persons whose water rights are seized and impaired by the federal government in future exercises of the reserved right." Trelease, F. *Federal-State Relations in Water Law, Legal Study Number 5*, National Water Commission, September 1971, p. 256.

[45] In this connection, it is not surprising that the state district judge observed the reserved water right claim "demonstrates to the court an avaricious appetite on the part of the tribes for practically all of the water in the Big Horn River system." Pet. App. F, p. 221a.

[46] *Shoshone Tribe and Northern Arapaho Tribe of the Wind River Indian Reservation v. The State of Wyoming, et al.*, No. 88-492, Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming, September 21, 1988, hereinafter "Tribes' Cross-Petition, upon which the Court has not yet acted."

> tion for use by themselves or by others or rather, consistently with the rights enjoyed by all other water users in Wyoming, they may export their reserved water off the Reservation.

In support of their cross-petition on this question, the Tribes complained of the Wyoming Supreme Court's affirmation of a portion of the state district court's decree providing that "the use [as well as the sale of reserved water] is confined to the reservation." Tribes' Cross-Petition, p. 22. It is difficult to imagine that the very same water which the Tribes openly seek to export for sale can be said to be necessary to satisfy the Reservation's "minimal needs" or to insure that the Reservation's primary agricultural purpose is not "entirely defeated." The Tribes suggest that such an exportation would lead to more "efficient use of this scarce resource" in that it would provide a source of money. Tribes' Cross-Petition, pp. 25-26. This Court has previously observed that reserved water rights were created by implication to provide only "an apportionment to the Indians of enough water to meet their subsistence and cultivation needs." *Fishing Vessel*, 443 U.S. at 684. The Tribes have now elevated this purpose to the need for cash which can be raised by the sale of excess[47] water, presumably to those who previously used it.

Moreover, from the Tribes' perspective, there has simply been an exchange of state water rights for Federal reserved rights. In so doing, a valuable set of rights has

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[47] The United States itself has recognized that the reserved water doctrine does not entitle Tribes to excess water:

> Under the Winters Doctrine, the needs of the plaintiff Indians are not for an excess amount of water which would assure them lives of indolence in contrast to lives exemplifying habits of industry and thrift.

Gila River Pima-Maricopa Indian Community v. United States, before the Indian Claims Commission, Docket No. 236-C, Defendant's Objections to Plaintiff's Requested Findings of Fact; Defendant's Requested Findings of Fact; and Brief on Loss of Use of Water, April 1978, at 302.

been traded for an invaluable one. The rights received are no longer subject to the limitations of state law regarding continued use (without which they would be subject to abandonment) or transfer to different uses[48] (for which there may be no injury[49] to other water users). Such a transfer would defeat this Court's admonition in *New Mexico* that water rights for secondary uses should be obtained under state law. Furthermore, relief from state law surely was not intended by Congress when it directed that state water rights be obtained for irrigation on the Reservation—at the same time that

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[48] For example, as claimed, the reserved water right included in-stream flows of up to 6,000 c.f.s. for fisheries, wildlife and aesthetic purposes, an amount which would completely curtail all upstream diversions. This claim was denied and the United States and Tribes sought to amend the judgment in that regard. Although the proposed amendment was rejected, the district court held that once the reserved water right is quantified for irrigation, it arguably may be used for virtually any purpose on the Reservation so long as the consumptive use is not increased. Amended Judgment and Decree, May 24, 1985, Pet. App. D, p. 183a. *See also* Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983, Pet. App. E, p. 194a. While the prohibition on any increased consumptive use may appear to be ample protection, it is important to remember that new uses may be non-consumptive, yet quite injurious to other users. For example, if the Tribes convert their reserved water right into the very fisheries flows for which a reserved water right was rejected, those fisheries flows would have the effect of eliminating diversions by other water users above and within the Reservation. Pet. App. F, pp. 259-260a.

[49] In their cross-petition, the Tribes pledge to transfer their water rights under "restrictions similar to those imposed by state law." This, according to the Tribes, "means that the Tribes entitlement to export water should be limited only if such exportation would cause other water users to be 'worse off than they would have been if the rights had been exercised for their original use at the original place." Tribes' Cross-Petition, n.16, p. 25. Such an approach would make sense if the entirety of the reserved right actually *had* been exercised. As a practical matter, however, roughly one-half of the right (that associated with "future" projects) has *never* been exercised. It is difficult to understand how that unexercised right could be transferred, then actually used for the first time, without injuring other water users.

a large portion of former Reservation lands were opened to entry by non-Indians who also were to obtain state water rights. Nevertheless, the award below has substituted the Federal reserved right's 1868 priority date for the 1905-15 priority dates of the state water rights. Since the Tribes now have the most senior water right on the Wind River, they have been vaulted ahead of the state water right priorities held by their non-Indian neighbors. In other words, instead of remaining as part of an integrated system of water right priorities, the Tribal members will receive water ahead of their neighbors who hold priorities which were formerly senior or equal to those of the Indians.

As a practical matter, the elevation of the Tribes' priority results in substantially more water being available to them. For example, during the summer of 1988, following entry of the decree below, non-Indian water users taking water from the same ditches as their Indian neighbors were shut down for the benefit of the Indian water users. In addition, to foreclose the same eventuality during the coming irrigation season, the State of Wyoming agreed to pay five million dollars, in return for the Tribes' promise not to exercise their reserved rights for one year. Whether viewed in the context of increased flexibility for their water rights, an increased amount of water received, or the ability to convert their water rights to money, the Tribes have undeniably received a windfall.

B. The "practicably irrigable acreage" quantification standard disregards the "sensitivity doctrine" established by this court and, as a result, causes significant dislocation of water rights established under state law.

This Court is keenly aware of the immense damage which the quantification of an implied reserved water right can cause to existing water uses under state law. "In the arid West . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the

rivers and streams." *New Mexico*, 438 U.S. at 699. The evidence in this case graphically demonstrated this conflict, moving both the master and the district court to acknowledge that damage to state-awarded rights would be occasioned by their recognition of a reserved water right for the Reservation.[50]

As one means of lessening the taut and harmful grip that reserved water rights can have upon Western water users, this Court has demanded that courts proposing to quantify a reserved water right conduct a "careful examination" of a reservation's minimal water needs "both because the reservation is implied, rather than expressed, and because of the history of Congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *New Mexico*, 438 U.S. at 700-701. When quantification of a reserved water right will reduce supplies available for water-needy state and private appropriators, this result must be a variable in the quantification equation. *New Mexico*, 438 U.S. at 705. This aspect of the law of federal reserved rights came to be referred to below as the "sensivity doctrine," from Mr. Justice Powell's dissent in *New Mexico*.[51]

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[50] Among the master's twelve findings of fact devoted to this issue was finding I.2.: "Today owners of water rights in Division 3 may suffer damages from an inability to put their rights to full use following the emplacement of an 1868 priority date for Indians in the upper reaches of the Wind River." Pet. App. H, pp. 688a-690a. *See also id.*, at 623a-630a. The district court reacted equally strongly in finding of fact 98: "The Court finds that the construction of any one or all of the future projects would have an adverse effect on other water users." Pet. App. F, p. 258a. This finding was inexplicably deleted by subsequently assigned District Judge Alan B. Johnson, sitting after the retirement of Judge Harold Joffe, who had written the district court's opinion and order, in spite of the Master's findings and in spite of the fact that no party had requested its deletion upon rehearing. Pet. App. D., p. 169a. While the finding was deleted, no contrary finding was substituted. Rather, the subject of injury was simply ignored.

[51] "I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and Congress' general policy of deference to state water law." *New Mexico*, 438 U.S. at 718.

Consequently, *New Mexico* teaches that quantification of a reserved water right must reflect the circumstances surrounding the reservation for which quantification is sought. A reviewing court must consider whether the right is express or implied, whether there is evidence of Congress' traditional intent to defer to state water law, whether the right sought goes beyond the minimal needs of the reservation, and whether quantification will damage water-needy state and private appropriators. Unfortunately, unflagging application of the practicably irrigable standard of quantification makes application of the "sensitivity doctrine," or any other rule of tailored consideration of an individual reserved water right claim, difficult in theory, if not impossible in practice. The practicably irrigable standard, appropriate as it may have been for quantification of the historically unproven needs of the reservations in *Arizona I*, is driven by a single factor, the amount of land which may be "practicably irrigated" upon an agricultural Indian reservation. As such, it is by its very nature rigid and unresponsive to consideration of the reasonable needs [52] of a reservation or of surrounding state and private users or of the reservation's historical irrigation experience.

After *New Mexico*, those Courts which have relied upon the "practicably irrigable acreage" standard have invariably applied it mechanically, without consideration of the careful examination called for by *New Mexico*.[53]

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[52] *See Arizona I*, 373 U.S. at 600-601, rejecting application of a need-based analysis in that case.

[53] The PIA standard has been applied at least four times (excluding the decision below) since *New Mexico*. *United States v. Anderson*, 736 F.2d 1358, 1361 (9th Cir. 1984); *United States v. Adair*, 723 F.2d 1394, 1415-16 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981); *Montana v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985). In not one of those decisions was there discussion that *New Mexico* required a less formalistic and more tailored approach to quantification than the practicably irrigable acreage standard

Instead, the courts have been more likely to assert that *New Mexico* does not apply to Indian reserved water rights,[54] despite *New Mexico*'s obvious reliance upon this Court's decisions in *Winters* and *Arizona I* to justify the "careful examination" called for by *New Mexico*. For its part, the Wyoming Supreme Court rejected the "needs test . . . as too uncertain." [55] To its credit, the Wyoming court did address the applicability of *New Mexico* to the quantification in question here, unfortunately concluding that *New Mexico* did not clearly apply.[56] Going on to assume that it might, the court further concluded, contrary to both the Master and the district court,[57] that sufficient sensitivity to state and private users had been shown by the court's announcement of a single agricultural purpose for the Reservaiton and by the court's rejection of certain lands claimed as "practicably irrigable acreage" by the United States and Tribes. Pet. App. A, p. 72a. Nowhere in the court's opinion is there a careful examination of whether the reserved right was express or implied, of evidence of

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presupposes. It was sufficient, having found an agricultural purpose, rotely to rely upon practicably irrigable acreage without more as the single basis for quantification.

[54] *See United States v. Adair*, note 53, above, 723 F.2d at note 13 and accompanying text.

[55] Pet. App. A, p. 47a, relying upon *Arizona I*.

[56] Pet. App. A, p. 70a-71a.

[57] In recognition of the inevitability of damage to state users which would result from this case, the Master limited the Tribes' development of their future projects only to no more than 10% of the total in each decade following the decree unless storage were put in place to provide water needed by Indian and non-Indian users. Pet. App. H, p. 584a. The district court prohibited construction of any future projects until such storage was in place. Pet. App. F, p. 235a-236a. The storage limitation was, however, eliminated by the subsequently assigned Judge Johnson upon rehearing. Pet. App. B, p. 169a.

deference to state law, or of the degree of injury to be suffered state users within the context of *New Mexico*.[58]

The decision of the Wyoming Supreme Court stands as testimony to brittle judicial adherence to the "practicably irrigable acreage" standard depite the teachings of *New Mexico*. While the district court made an effort to quantify the Tribes' rights with sensitivity by imposition of the storage requirement,[59] the Wyoming Supreme Court was unable to square *New Mexico* with the practicably irrigable acreage standard. Its substitute was to suggest that certain findings, compelled by law and facts unrelated to the careful examination called for by *New Mexico*, fulfilled the court's obligation to quantify the reserved water rights with sensitivity, all in spite of the fact that the reserved right below was implied, that the 1905 Act evidences an obvious example of Congress' deference to state law, that state and private users would be damaged by the quantification, and that the quantification will result in a windfall for the Tribes.

C. The "practicably irrigable acreage" quantification standard's inflexibility results in inherent problems of proof which divert the trial courts from apportioning water to meet the Indians subsistence and cultivation needs.

Because the "practicably irrigable acreage" quantification standard establishes a maximum amount on the Indian reserved water right, it is unavoidable that the evidence presented by the Tribes, and the United States on their behalf, is calculated to maximize the amount awarded. The evidence is restrained only by the creativity of counsel and expert witnesses. Instead of focus-

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[58] In spite of the findings below, the Wyoming Supreme Court mechanically concluded that there was no indication that there would be a gallon-for-gallon reduction in supplies to non-Indian users by quantification of the reserved water rights. Pet. App. A, p. 71a.

[59] *See* note 57, above.

ing on the "apportionment to the Indians of enough water to meet their subsistence and cultivation needs," required by *Arizona I* and by *Winters*, as interpreted in *Fishing Vessel*, 443 U.S. at 684, the overwhelming temptation is to simply maximize the amount of land which may be irrigated on the reservation. In fact, in the adjudication below, adherence to *Arizona I*'s practicably irrigable acreage standard, induced the state court master to observe that he had a "duty" to find practicably irrigable acreage on the Wind River Indian Reservation [60] and that he found it "incredible" that there might not be future irrigation projects which were economically feasible.[61]

As demonstrated by this case, the simple-sounding concept of "practicably irrigable acreage" is one which is difficult to define. Eventually, the parties stipulated to a factual definition of "practicably irrigable acreage" as being, "those acres susceptible to sustained irrigation at reasonable costs." [62] Pet. App. F, p. 229a. The trial

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[60] Tr. 8906. The Master stated, ". . . I'm going to have the duty to search for some rationale to justify a practicably irrigable acre on this Reservation, and I'm not going to find it in the history of the Bureau of Reclamation, I don't think."

[61] The Master, frustrated by the state's position that none of the future projects was economically feasible under discount rates normally used by the United States, stated, "I find it incredible that an economic or sensitivity analysis could conclude that not a single acre of the future lands claimed is economically feasible!" Pet. App. H, p. 579a. In very nearly the same breath, however, the Master also opined that "in the real world of today's interest and inflation and uncertainty of agriculture, doubt exists that much of the 'futures' land may ever be a part of any newly constructed project." *Id.* at 584a.

[62] In *Arizona I*, this Court's master used "practicably irrigable" as meaning "that quantity of water . . . required to make the Reservations livable." In *Arizona II*, the new master defined the term as "economically feasible." Report of the Special Master, *Arizona v. California*, No. 8 Original (Feb. 22, 1982), hereinafter "*Arizona II* Master's Report," pp. 90, 94.

court further defined "sustained irrigation" as "[t]he ability of a soil to produce a relatively high yield of crops under irrigation over a long period of time without deterioration." Pet. App. H, p. 715a.

Based on the elegant simplicity of these definitions, the Wyoming Supreme Court affirmed an award of a reserved water right in the total amount of 500,420 a.f. per annum, being comprised of 290,490 a.f. for 54,221 acres of "historic" lands and 290,930 a.f. for 48,520 acres of "future" project lands. In general, the amount of the award below for the Wind River Indian Reservation was greater than that for any of the *Arizona I* reservations, except for the massive Colorado River Reservation. *Arizona I* Master's Report, at p. 272.

For the "historic" lands, the Wyoming courts fashioned a presumption that if the lands were the subject of a state-awarded water right they were practicably irrigable. The resulting 54,221 acres have never been collectively irrigated during any one year. Instead, they comprised all such lands which had ever been irrigated since the reservation was established, together with lands [63] which could be irrigated in the future by the extension of existing irrigation ditches. Nevertheless, the annual amount of the reserved water right based on the historic lands allows them all to be simultaneously irrigated. The ultimate result was simply to exchange state-awarded water rights (which Congress had directed be obtained by the Indians) for Federal reserved water rights. As previously described, the practical effects of that swap are immense.

For the "future" project lands, which had never been irrigated and which, for the most part, had been restored to the reservation for grazing purposes, *see* page 6, supra, the stipulated definition was applied insofar as it

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[63] These lands, treated similarly to "future" project land, were known as "Type VIII." Pet. App. H, p. 500a.

could be without the experience of actual irrigation. As a result, the United States assembled a team of experts to determine which lands on the Reservation were arable, which of the arable lands could be irrigated feasibly from a physical or engineering standpoint, and which of those lands were economically feasible to irrigate. In general, as represented to the trial court,[64] this process is conceptually identical to that employed by the United States Bureau of Reclamation.[65] While petitioner fully understands that this Court does not review the factual findings of state courts and while the state court master found the evidence of the United States to be "professional and persuasive," the type of evidence which was used below to quantify the reserved water right demonstrates the extent to which the term "practicably" can be stretched. The Court will undoubtedly be told by *amici* that quantification based on "future" projects is nothing more than speculation, supported by merely hypothetical projects. The facts of this case confirm such

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[64] In its counsel's opening statement to the trial court below the United States advised, "This is how the United States, and I might add, most other, if not all other in this country, major irrigation planners go about establishing whether or not land is capable of sustaining irrigation. This we did." Tr. 42.

[65] The United States, acting through the United States Bureau of Reclamation (USBR), has a long history of soil and land investigations throughout the United States and within the Wind River Basin. From 1917 through 1978, USBR conducted nine soil and land investigations of varying detail pertinent to irrigated agriculture within the Wind River Basin. Joint Appendix VII-431. U.S. Ex. WRIR C-43 (pp. 4-5); Wyo. Exh. WRIR SF-1 (pp. 14-15). That experience resulted in standards which, until this adjudication, the United States was content to follow as reliable, economically sound indicia of which irrigation projects were worthy of development. The Bureau of Reclamation's work has long been recognized as, and continues to represent, the state-of-the-art in land classification work for determining arability and irrigability. As such, they represent the most widely used and accepted methods for irrigation development. Tr. 3487, 10821-22.

assertions[66] and highlight the fact that few litigants, aside from the United States, can afford to participate in the process.

In identifying arable lands for this adjudication, the United States strayed far from the Bureau of Reclamation methodology by using more inclusive definitions, a lower study intensity, and reduced standards for arability. In addition, the United States frequently failed to apply even its own standards, with the result that all future projects included non-arable lands. In fact, for the purposes of this adjudication, the United States classified as arable some 26,275 acres which previously had been classified as *non*-arable by the Bureau of Reclamation.[67] The practical upshot of this exercise was that the Wyoming courts awarded reserved water rights based on a study intensity upon which the United States, acting through the Bureau of Reclamation, would not otherwise rely for actual project development.[68]

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[66] The former Wyoming State Engineer testified that the projects were "far beyond the realm of ordinary feasibility," Tr. 12168, while the former State Soil Scientist, U.S. Soil Conservation Service, testified that the physical inquiry upon which the projects were based was "wholly inadequate." Tr. 10634.

[67] The USBR had previously made extensive investigations of arable land on the reservation. The area so investigated overlapped with the investigation made by the United States in this adjudication. Within that common area, the United States classified as arable some 26,275 acres which previously had been classified as *non*-arable by the USBR. A comparison of the level of intensity explains the difference. For example, in the area of common agreement, there was one soil test hole per 70 acres of study area. In the area of disagreement, however, there was an intensity of only one test hole per 360 acres. In other words, the intensity of the United States' investigation was less than one-fifth that of the USBR. Nevertheless, the United States' classified the same 26,275 acres as arable for this adjudication which the USBR previously had classified as nonarable. Wyo. Exh. WRIR SS-9.

[68] Before construction begins on a USBR project, a *detailed* investigation must be made. Wyo. Exh. WRIR SK-5 (Ch. 4, ¶ 115.4.2). The arability investigation by the United States, in this adjudica-

In determining engineering feasibility, the United States relied on the most advanced current technology available, rather than irrigation practices existing in 1868 when the Reservation was created.[69] In establishing the economic feasibility of the projects, the United States dramatically departed from the Bureau of Reclamation approach by reducing the discount rate, to levels far below those which the United States would use in deciding whether actually to build the projects,[70] increas-

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tion, was styled as being a "modified semi-detailed" study. Tr. 1108. This approach must be contrasted with the various categories of arability studies normally conducted by the USBR which recognizes three levels of land classification, differentiated by the amount of detail and the accuracy of results: reconnaissance, semi-detailed and detailed investigations. Wyo. Exh. WRIR SK-4 (Ch. 2.6).

[69] If judicial quantification of the implied reserved water right is to effectuate Congress' intent in 1868 when the Reservation was created, it would seem only reasonable that technology used to quantify the right would be of the same date. Nevertheless, the state court master agreed with the United States' use of current technology, stating "My reading of [*Arizona I*] supports the view that the evidence of "practicable irrigability" was determined by then current standards. Judge Elbert P. Tuttle, Special Master in the 1982 re-hearing, concludes that 'the determination of practicable irrigability should be based on present standards. Reference to past standards would introduce an additional complication in an already complex case.' I agree and find accordingly." (footnote omitted) Pet. App. H, p. 535a.

[70] Although the "future" projects would be admittedly financed by the United States, Tr. 5078, the discount rate used by the United States and accepted by the Wyoming courts was inconsistent with and violated the provisions of Federal law dictating the discount rate to be used in the formulation and evaluation of federal water projects. 42 U.S.C. § 1962d-17(a). That section requires the use of the discount rate annually determined by the Water Resources Council which was 7⅛% for 1979, the year for which all costs were valued at trial. Tr. 6071, 42 Fed. Reg. 62116 (1979). The results of the United States' own analyses showed that none of the pro-

ing crop yields, accelerating the time for full production of the projects,[71] reducing their production costs, and reducing management and labor costs.[72]

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posed projects were feasible at discount rates of 7% or greater and that the discount rate must be below 5% for all five projects to be feasible. U.S. WRIR C-274, Wyo. Exh. WRIR ED-100. The United States began its pretrial feasibility analysis using a rate of 7⅛%, the rate then recommended by the Water Resources Council for federally-funded projects. At that discount rate, however, none of the projects, even using reduced component costs adopted by the United States, were feasible. Although it is standard procedure to continue to use the rate in effect at the time a benefit/cost analysis is done, Tr. 6073, the United States then changed its discount rate from 7⅛% to 4%, Tr. 5042, and, later, from 4% to 2%. Tr. 5049. Once again, as with respect to its arable land analysis, the United States disregarded those specific standards which are applicable to all other evaluations of water projects by the federal government. Furthermore, in *Arizona II*, the state parties and the United States' both used discount rates of 7% and 7⅛%, respectively, in their analysis. *Arizona II* Master's Report, at p. 165. In addition, the discount rate applied by the Water Resources Council has steadily risen since 1979. For 1988, it was 8 5/8%. At no time since 1979 has the Council's discount rate ever been as low as 7⅛%.

[71] The United States' feasibility analysis was based on *immediate* full production in each of the projects, Tr. 5870-71, in spite of uncontroverted evidence that, for existing producers in the Reservation area, up to ten years were required to reach full production after project initiation, Tr. 14991, and that in the recent *Arizona II* hearing, the Special Master used reduced yields over a three to five year period for all major cash crops considered. *Arizona II* Master's Report, at pp. 306-315.

[72] The United States' feasibility analysis admittedly included management and labor costs at a level far below those which would actually be incurred. Because of unemployment levels on the Reservation, the United States assumed that management and labor personnel for the future projects would come from the ranks of the unemployed, and as a result, *included only 20% of actual management and labor costs in its feasibility analysis*, based on 45% unemployment on the Reservation. Pet. App. H, p. 569a.

It is small wonder that the state-court master[73] and the dissent in the Wyoming Supreme Court[74] were doubtful that the "future" projects would ever be built. Their skepticism was overcome, however, by their belief that, under the practicably irrigable acreage of *Arizona I*, they were without the discretion to review the evidence based on the concepts normally available to triers of fact, pragmatism and reasonableness. For this reason alone, the "practicably irrigable acreage" quantification standard should be rejected for universal application to agricultural Indian reservations. As described below, it should be replaced by a flexible approach which allows trial courts to tailor the reserved water right to meet

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[73] "As it is now, it appears that no matter what benefit-cost ratios are arrived at, or discount figure used, in the real world of today's interest and inflation and uncertainty in agriculture, doubt persists that much of the "futures" land may ever be a part of any newly constructed irrigation project." Pet. App. H, p. 584a.

[74] ". . . there should be a pragmatic limitation on the standard for quantification, the practicably irrigable acreage, which would eliminate those lands from the quantification formula which only could be irrigated by the construction of some future water project. . . . * * * . . . there has to be some degree of pragmatism in determining practicably irrigable acreage. It is clear from the majority opinion that there was included in quantifying the water reserved to the Indian peoples lands not now irrigable but deemed to be practicably irrigable acreage upon the assumption of the development of future irrigation projects. I would be appalled, as most other concerned citizens should be, if the Congress of the United States, or any other governmental body, began expending money to develop water projects for irrigating these Wyoming lands when far more fertile lands in the midwestern states now are being removed from production due to poor market conditions. I am convinced that, because of this pragmatic concern, those lands which were included as practicably irrigable acreage, based upon the assumption of the construction of a future irrigation project, should not be included for the purpose of quantification of the Indian peoples' water rights. They may be irrigable academically, but not as a matter of practicality, and I would require their exclusion from any quantification." Pet. App. A, p. 84a.

the needs of individual reservations' primary agricultual purpose.

IV. The "practicably irrigable acreage" quantification standard should be replaced with a tailored approach under which the conditions existing on each agricultural Indian reservation are evaluated in determining the amount of the Federal reserved water right which is necessary to meet the reservation's minimum needs and to ensure that its "primary purpose" is not "entirely defeated."

The "practicably irrigable acreage" quantification standard for Federal reserved water rights should be replaced by a tailored approach which can be adapted to the needs associated with the primary purpose of agricultural Indian reservations. As this Court stated in *Cappaert*, reserved water rights must be "tailored . . . to minimal need." 426 U.S. at 141. In addition to ensuring that minimal needs are met, the trial courts should also be at liberty to award reserved water rights in amounts: that are calculated to insure that a reservation's primary purpose(s) is not "entirely defeated;" that, insofar as possible within the constraints of the primary purpose, provide the reservation's Indians with water necessary to a "moderate" living standard; and, that will be "sensitive" to potential dislocation of state water rights.

In the context of an agricultural Indian reservation, such an approach would be no more difficult for the trial court than the excruciating evidentiary exercise involved in determining practicably irrigable acreage.[75] Although common wisdom holds that the practicably irrigable acreage standard promotes certainty and fairness, there could

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[75] In the action below, in determining practicably irrigable acreage for the Wind River Indian Reservation, the Wyoming trial court and its master conducted ninety-six days of trial, received 1,940 exhibits, and heard the testimony of 46 witnesses. The transcript for this portion of the trial comprised 14,963 pages.

be nothing less certain than the status of the reserved right of 210,000 a.f. for "future" projects which in all probability will never be built. Furthermore, there could be nothing less fair than exchanging Congressionally-mandated state-awarded water rights for Federal reserved water rights, with the attendant injury caused to the holders of other state water rights and the windfall conferred on the Tribes.

Consequently, the Court should announce a "tailored approach" to the quantification of Federal reserved water rights, enabling the trial courts to confirm a reservation's primary agricultural purpose, determine the reservation's agricultural needs, and quantify the amount of water necessary for those agricultural needs. As part of the quantification process, however, trial courts should be directed to consider: the amount of water historically used on the reservation for agricultural purposes; whether the reservation has had an opportunity to fully develop its agricultural industry; and, if it has not, whether there is a quantifiable need for additional water to serve lands which can realistically be expected to be irrigated in the future.[76] In the event that state-awarded rights have been obtained by or on behalf of the Indians, the trial court should determine whether additional Federal reserved water rights are necessary to meet the reservation's agricultural needs. In the context of this adjudication, the foregoing approach would result in an award of reserved water rights for the Wind River Indian Reservation only in an amount which is necessary to ensure that its primary agricultural purpose is not entirely defeated *and* which is not already satisfied by Congressionally-mandated state water rights.

In other words, without violating the principles announced in its earlier cases, this Court can establish an

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[76] With respect to such future lands, the amount of water should be calculated based on successful agricultural technology currently prevalent in the region in which the reservation is located.

approach to quantification which allows trial courts the flexibility necessary to fashion varying awards of water to agricultural Indian reservations in varying circumstances.

It can inevitably be anticipated that Indian tribes will point out that the primary agricultural purpose of their agricultural reservations is now outmoded, i.e. that it may be impossible to generate a moderate living for Indians based solely on agriculture. Where this may be true, relief from that difficult situation is appropriately sought from the Congress or the Executive, whichever established the reservations for agricultural purposes, and not from the Judiciary. As has been long recognized, the reserved right doctrine is a financial doctrine, shifting the burden of providing reservation water from the public treasury to private water users. While that may have become accepted practice with regard to water for the original purpose of the reservation, it has not been true with respect to new purposes to which the reservation may be put. Consequently, if the usefulness of a reservation's original purpose has been outlived, Congress or the Executive should expand the purposes. If the expanded purposes require additional water, a new Federal reserved water right with a recent priority date may be expressly created, or appropriate state water rights obtained. If these prove to be insufficient, public funds may be expended to acquire the existing water rights of others. In any event, water for secondary uses should be obtained under state law. *New Mexico.*

CONCLUSION

The judgment of the Wyoming Supreme Court, insofar as it affirmed the award to the Tribes of a Federal reserved water right based on a quantification established by practicably irrigable acres rather than any concept of necessity should be reversed and remanded with instructions to enter a decree awarding a Federal reserved water right in only the amount of water necessary to irrigate those historically irrigated Indian lands within the Wind River Indian Reservation which are not and have never been awarded state water rights.

Respectfully submitted,

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